Rehabilitation Nursing Specialisits and Associates, Incorporated *and* United Service Employees, Local 616, Service Employees International Union, AFL-CIO. Case 32-CA-4021

April 13, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on October 29, 1981, and amended November 19, 1981, by United Service Employees, Local 616, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Rehabilitation Nursing Specialists and Associates, Incorporated, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on November 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 9, 1981, following a Board election in Case 32-RC-1322, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in a certain unit found appropriate;[1] and that, commencing on or about October 21, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 10, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 29, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 7, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent denies the conclusion that Respondent is an employer engaged in interstate commerce. It also denies that (a) the complaint unit is appropriate, (b) the Union was certified as the exclusive collective-bargaining representative of the employees in said unit in Case 32-RC-1322, (c) pursuant to Section 9(a) of the Act, since July 15, 1981, the Union has been the collective-bargaining representative of the employees in that unit, and (d) its conduct has violated Section 8(a)(5) and (1) of the Act. Respondent's answer also contains an affirmative defense that the Certification of Representative issued in Case 32-RC-1322 is defective because it is based on an erroneous denial of its objections to conduct affecting the election in Case 32-RC-1322. In its response to the Notice To Show Cause, Respondent reiterates the affirmative defense proffered in its answer. The General Counsel asserts that Respondent seeks to relitigate issues that were raised and decided in the representation case. We agree with the General Counsel.

Although Respondent's answer denies the General Counsel's allegation that it is an employer engaged in interstate commerce, it admits it is engaged in the business of providing rehabilitation and other health care services, and in the last fiscal year ending June 30, 1980, derived revenues in excess of $100,000, approximately $90,000 of which was received from the Federal Government through the Medicare program. Our review of the record, including the record in Case 32-RC-1322, shows that the Board considered and rejected Respondent's arguments in support of its contention that it is not an employer engaged in interstate commerce. Further, notwithstanding Respondent's other denials delineated above, our review of the record shows that the Union filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent certain of Respondent's employees, at its place of business in Oakland, California. On April 22, 1981, the Regional Director for Region 32 of the National Labor Relations Board issued a Decision and Direction of Election in Case 32-RC-1322, in which he directed elections be conducted in three units,

[1] Official notice is taken of the record in the representation proceeding, Case 32-RC-1322, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

units A, B, and C. Respondent filed with the Board a request for review of the Decision and Direction of Election, which the Board denied on May 27, 1981. The elections were held on May 21, 1981, and the ballots were impounded (pending the Board's decision on the Respondent's request for review.) Subsequently, the ballots were opened, counted, and tallied. The tally of ballots shows that in unit A, consisting of approximately 15 eligible professional employees, 8 cast ballots for inclusion and 6 against inclusion with the nonprofessional employees in unit B for a single unit for purposes of collective bargaining. In unit A, there was one challenged ballot which was not determinative of the election results. The tally of ballots for units A and B together[2] shows that, of approximately 21 eligible voters, 11 cast ballots for, and 8 cast ballots against, representation by the Union. There were two challenged ballots which were not determinative of the election results. The tally of ballots for unit C, Respondent's office clerical employees, shows that, of approximately three eligible voters, one cast a ballot for, and two cast ballots against, representation by the Union. There were no challenged ballots.

On June 9, 1981, Respondent filed timely objections to conduct affecting the results of the election in Case 32-RC-1322. On July 15, 1981, following an investigation of Respondent's objections, the Regional Director issued a Report on Objections (overruling the objections) and Certification of Representative (with respect to unit A and B) and Certification of Results of Election (with respect to unit C). On July 27, 1981, Respondent filed with the Board exceptions to the Regional Director's Report on Objections and Certification of Representative and Certification of Results of Election. On October 9, 1981, the Board issued its Decision and Certification of Representative and Certification of Results, in which it adopted the Regional Director's recommended disposition of Respondent's objections, certified the Union as the exclusive collective-bargaining representative of Respondent's employees in unit A and B, and certified the results of the election in unit C. Commencing on or about October 15, 1981, and continuing thereafter, the Union requested that Respondent meet with it as the exclusive representative of the employees in unit A and B for the purpose of bargaining collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Commencing on or about October 21, 1981, Respondent failed and refused, and continues to fail and refuse, to recognize or bargain with the Union as the exclusive representative of the employees in unit A and B.

It thus appears that Respondent is attempting to raise issues that were raised in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, with a place of business in Oakland, California, is a nonprofit, charitable organization which provides specialized rehabilitation and other health care services for patients in their own homes. During the last fiscal year ending June 30, 1980, Respondent derived revenues in excess of $100,000, approximately $90,000 of which was received from the Federal Government through the Medicare program.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Service Employees, Local 616, Service Employees International Union, AFL-CIO, is a

[2] As combined, the appropriate unit is: All full-time and regular part-time home health aides, registered nurses, public health nurses, rehabilitation nursing specialists, speech therapists, medical social workers, occupational therapists, and physical therapists, including contractors, and employed by the Employer out of its 2929 Summit Street, Oakland, California facility, excluding office clerical employees, guards and supervisors as defined in the Act. Hereafter, this unit is at times referred to as unit A and B.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time home health aides, registered nurses, public health nurses, rehabilitation nursing specialists, speech therapists, medical social workers, occupational therapists and physical therapists, including contractors, and employed by the Employer out of its 2929 Summit Street, Oakland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On May 21, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on October 9, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 15, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 21, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Rehabilitation Nursing Specialists and Associates, Incorporated, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Service Employees, Local 616, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time home health aides, registered nurses, public health nurses, rehabilitation nursing specialists, speech therapists, medical social workers, occupational therapists and physical therapists, including contractors, and employed by the Employer out of its 2929 Summit Street, Oakland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for

the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 9, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 21, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rehabilitation Nursing Specialists and Associates, Incorporated, Oakland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Service Employees, Local 616, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time home health aides, registered nurses, public health nurses, rehabilitation nursing specialists, speech therapists, medical social workers, occupational therapists and physical therapists, including contractors, and employed by the Employer out of its 2929 Summit Street, Oakland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at 2929 Summit Street, Oakland, California, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Service Employees, Local 616, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding

is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time home health aides, registered nurses, public health nurses, rehabilitation nursing specialists, speech therapists, medical social workers, occupational therapists and physical therapists, including contractors, and employed by the Employer out of its 2929 Summit Street, Oakland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

REHABILITATION NURSING SPECIALISTS AND ASSOCIATES, INCORPORATED